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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION,
Petitioner,

—v.—

UNITED ARTISTS TELEVISION, INC.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

The Authors League of America, a national society of writers and dramatists, respectfully moves for leave to file the annexed brief, *amicus curiae,* in support of the petition for rehearing. Counsel for the Petitioner has consented to the filing of the brief; counsel for the Respondent has refused to consent.

The Court's decision sharply curtails the rights of authors of plays, motion pictures, television dramas, musical and other works which are communicated by CATV systems to their subscribers. It will deprive these authors of compensation for the use of their works in the rapidly expanding medium of CATV. It will also have adverse effects for the public, and for educational, public and commercial

television—by reducing the number of plays, motion pictures and other works that are made available for broadcasting by non-profit and commercial stations.

Counsel for the applicant is familiar with the questions involved in this case and scope of their presentation and believes there is a necessity for additional arguments on the points specified in the brief of The Authors League.

Because the issue involved is of vital concern to American authors, The Authors League respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC.

Interest of The Authors League

Although the word "author" is not used once in either the majority or dissenting Opinions, the decision of the Court is nonetheless of tremendous importance to American authors who write the motion pictures and television programs which constitute the stock in trade of the CATV industry. It is unfortunate that the basic issue—the interpretation of rights granted to the *author* in Section 1 of the Copyright Act (see Section 9)—was resolved in the context

of a dispute between corporations that produce motion pictures and the rapidly expanding CATV industry. In this context, the fact that it is the author's rights which are at stake seems to have been lost sight of, with the unfortunate consequence that the Court has construed Sections 1(c) and 1(d) of the Act to allow a vast industry to communicate works of American authors to "additional viewers" for profit while denying the right of the authors to share in income which their works produce.

The Authors League is a national society of authors and dramatists. Many of its members have written books and plays which have been adapted into television programs and motion pictures exhibited on television. A substantial number also write motion pictures and dramas for television; and a number write music. The income of these authors depends on the proceeds received by the producers of these works; frequently, they are compensated by a share of these proceeds.

Summary of Argument

We respectfully submit that CATV's communication of copyrighted works to audiences of viewers is an activity encompassed by the rights granted to authors of dramatic works in Section 1 for the following reasons:

1. This Court overlooked a provision of the statute which plainly shows that the Congress did not intend the narrow interpretation of "performance" which the Court adopted. The "Juke-box" exemption of Section 1(e) establishes that the term "public performance" was intended by Congress in 1909 to include the furnishing of performances of copy-

righted works to the public "in any manner or by any method whatsoever"; and that the term was intended to include uses such as that the CATV industry makes of copyrighted works.

2. CATV's use of copyrighted works is also encompassed by the rights granted the authors of copyrighted works to "exhibit", to "represent", to "produce" or to "reproduce" his dramatic work—*"in any manner or by any method whatsoever."* (Emphasis supplied)

3. The creation of a CATV exemption from the rights granted authors in Sections 1(c) and (d) is inconsistent with the fundamental purpose of the Copyright Act and the constitutional mandate for it and will not only deprive authors of compensation for profitable uses of their work but will also damage the public, and commercial and non-commercial television by deterring the release of copyrighted works for exhibition in these media.

POINT I

In interpreting the word "performance" the Court overlooked the provisions of Section 1(e) of the Copyright Act which demonstrates that the CATV industry's use of copyrighted works constitutes a "public performance".

We respectfully submit that CATV's carrying of performances of copyrighted motion pictures and other copyrighted works to its audiences ("additional viewers") is an act of "public performance" in the sense that Congress used the term in Section 1 of the 1909 Copyright Act. This meaning is established as indicated below by the provisions of Section 1(e) of the Act. Moreover, Section 1(e) indicates

the invalidity of certain fundamental premises on which the majority opinion rests.*

Section 1(e) grants the author of a musical composition the right "to perform the copyrighted work publicly for profit." Section 1(d) grants the author of a dramatic work the same right—without limiting it to performances "for profit." In the last paragraph of Section 1(e), Congress granted a partial exemption** from the "public performance" right to certain proprietors of the coin-operated phonograph (the "jukebox"):

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

It is obvious that Congress understood the act of furnishing the public with performances of copyrighted songs by means of commercially operated phonograph machines was a "public performance," as it used the term in 1909. Section 1(e) did not create a separate right of performance by phonograph machines. It simply exempted certain types of

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* While the following discussion of the meaning of "public performance" considers only this aspect of the issue, we respectfully submit that the reasoning of the Court of Appeals and the arguments made in the briefs of Petitioner and various *amici curiae* in the appeal also support the conclusion that CATV is engaged in a "public performance" of copyrighted works when it carries broadcasts of them to its subscribers.

** "The jukebox exemption is a historical anomaly. The exemption was placed in the law in 1909 at the last minute with virtually no discussion. The coin-operated music machines of that day were apparently a novelty of little economic consequence. The jukebox industry is now among the largest commercial users of music, with an annual gross revenue of over a half-billion dollars." (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress, 1st Session, p. 32.)

commercially operated phonographs from the general "public performance" right. As the Committee Report (No. 2222, 60th Congress, 2nd Sess.) makes clear, the exemption is an "*exception* regarding the *public performance* of a musical composition on coin-operated machines" where admission is not charged (p. 9). (Emphasis supplied.) Where "admission is charged, the operation of a coin-operated machine violates the general "public performance" right. Moreover, the use of a non-coin operated machine to furnish performances to the public is a "public performance" and, if unauthorized, violates the author's copyright (the "jukebox" exemption does not refer to non-coin operated machines). *Irving Berlin, Inc.* v. *Daigle,* 31 F. 2d 832, 833; *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.,* 334 F. 2d 303.

Section 1(e) thus establishes that Congress used the term "public performance" to include not only the staging of a performance of a copyrighted work but also the independent act of providing the public with a performance staged by someone else. The proprietor of a jukebox (or other commercially operated phonograph) has no relation to the staging of the original performance—the playing and singing of the song in the studio of the record company. He simply furnishes that performance to the public. That is what the public pays him for. That is how he exploits the copyrighted work. That is his act of "public performance." Unless he has received the author's permission (or is protected by the jukebox exemption) he is guilty of infringing the author's right of public performance.

Since the right "to perform the copyrighted work publicly" as used in Section 1(e) includes the separate act of furnishing performances to the public, it has the same mean-

ing when used in Section 1(d), with respect to dramatic works. As the Court held in *Atlantic Cleaners and Dyers* v. *U.S.*, 286 U.S. 427: "There is a natural presumption that identical words used in different parts of the same Act are intended to have the same meaning." (P. 433)

We respectfully submit that CATV, like the proprietor of a jukebox or other commercially used phonograph, is furnishing audiences with performances of copyrighted works staged by others, and therefore is giving a "public performance" of these works. The CATV system and the jukebox proprietor each use someone else's authorized dissemination of a performance to retransmit the work to their customers. The jukebox proprietor uses phonograph records of a performance, which were made and disseminated by permission of the author. The CATV system uses the broadcast of a performance (or of a film or tape recording of it) which was disseminated by permission of the author. That CATV uses different machinery does not alter the fact that it is engaged in the same act as the jukebox proprietor—furnishing performances to the public. As Mr. Justice Holmes concluded in *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55 (1911), the rights granted an author in the Copyright Act of 1891 to dramatize his work included the right to furnish performances to the public by motion pictures, "although the machinery is different and more complex" than the "live" performance which was the only method of communicating dramatic works when the 1891 Act was written (cf. *L. C. Page & Co.* v. *Fox Film Corporation*, 83 F. 2d 196).

The Premises on Which the Majority Opinion is Based are Inconsistent with Section 1(e)

The majority opinion concludes that CATV is not engaged in a public performance because its customers "view"

rather than "perform" the programs they receive; and it merely enhances their capacity to view, providing them with the improved reception that they could have had if they had purchased the necessary equipment themselves. Section 1(e) refutes this argument.

The Viewer "Performs"—but he does not "Publicly Perform"—the Work

For the reasons indicated below, it is irrelevant whether or not each of the CATV system's customers is deemed to "perform" the copyrighted works which the system provides to him. However, the conclusion that the viewer does not "perform" the work by operating the television set is erroneous. Section 1(e) establishes that the operation of a phonograph by a listener is a "performance". The same activities are involved whether he plays a phonograph in his home or a coin-operated machine in a dance hall. Playing the machine in a dance hall is a performance—and an infringement (if admission is charged).* Obviously, it is a performance to play the machine in his home. The vital distinction is whether the "performance" is public or private. Since the authors of dramatic and literary works are granted the right of public performance, when an individual operates his phonograph in his living room, he does not infringe because the performance is private.

A television set serves the same purpose as a phonograph machine. It translates signals into sight and sound, just as the phonograph translates into sound the electrical energy created by the vibrations of the needle. The operation of a television set by a viewer is an act of performance just as is the operation of a phonograph machine by a listener. An

* It would also be infringement if a non-coin operated machine were played by the proprietor.

individual viewing a copyrighted work on his set also performs the work—but does not infringe because his performance is private.

However, a CATV system does not view performances. It furnishes them to many individuals—collectively, a public audience. Its act of performance is public rather than private.

CATV's "Enhancement" of Its Customers' Reception is Public Performance.

The majority opinion concludes that a CATV system does not publicly perform because it accomplishes the same result which its individual customers could obtain by buying and operating their own antenna and amplifying equipment.

Individual viewers cannot afford to acquire or operate the complex and costly equipment a CATV system requires; and the antenna equipment which individual customers can afford, does not receive the programs which a CATV system carries in from distant stations. But this is irrelevant from a copyright viewpoint.

An individual can buy a record and play it on his phonograph machine—without an infringement occurring. But if a radio station provides him with the same performance by playing the record, or if a proprietor of a jukebox or other commercially used phonograph machine brings him the same performance from the same record, an infringement occurs. Under the Copyright Act an individual is free to make various uses of a dramatic or musical composition, which would be infringement if provided for him (as a member of the public) by an entrepreneur, for profit. As noted, the Act makes a basic distinction between a public and private performance.

Moreover, CATV is not a mere adjunct of its customer's set. On the contrary, the customer's set is a part of a complex commercial system for furnishing performances to a public audience. So long as his set is connected to the CATV system, he receives only those performances which it chooses to bring him. If it were not carrying a local station, he could not receive the station's programs while his set is part of the CATV system—although he could if it were disconnected from the system. On the other hand, he receives programs broadcast by distant stations which he could not receive were his set operating independently of the system. The control of the system's contents rests solely in the hands of its proprietor, not of the individual viewer. The CATV system determines what will flow over its channels. Thus the District Court found:

> "Defendant's systems preselected the stations whose programs were provided to its subscribers; and supplied some of said subscribers with programs contrary to their expressed preference, and in some instances, even contrary to the expressed preference of most of the subscribers." 255 F. Supp. at 188.

Indeed, the customer's set is usually operated by a special selector knob installed by a CATV system rather than by the dial built on by the manufacturer. As in the case of the jukebox, the customer plays a part in operating the system—he turns the knob to select from among the performances which it makes available. But as in the case of the jukebox, this does not alter the fact that the proprietor of the system is engaged in a public performance.

CATV's Use of Copyrighted Materials Is Sufficiently "Active" to Constitute Infringement.

The majority opinion also concluded that a CATV system did not engage in public performance because it did not procure or propagate broadcasts. The Copyright Act does not require that a commercial user of copyright works must actively participate in selecting or propagating performances as a condition of liability for infringement. On the contrary, the Act has been interpreted to prohibit entrepreneurs from exploiting the performance of copyright works even though their role in the performance was totally passive. For example, in *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, 36 F. (2d) 354, it was held that the proprietor of a dance hall was liable for infringing copyrighted musical compositions performed in his establishment even though he "did not direct the playing of any selection, and did not know that any musical selection played by the orchestra was copyrighted" and although the orchestra was an independent contractor. As the Circuit Court there pointed out, the proprietor is guilty of infringement "if the playing be for [his] profit." (Cases cited, page 355). See also, *Shapiro, Bernstein & Co.* v. *H. L. Green Company*, 316 F. 2d 304 (cases cited pp. 307-308).

Moreover, Section 1(e) makes it clear that CATV cannot be absolved on any theory of passivity. CATV is a far more active participant in the process of communicating performances to the public than is the proprietor of a coin-operated phonograph machine. The latter simply stocks his machine with records and leaves it to the customer to turn on the machine and select the compositions to be performed. He does not actively participate in the communicating of the performances. Nonetheless, Congress understood that this pas-

sive act of communication, by an entrepreneur, was a "public performance" and only exempted it from liability if admission was not charged.

By contract, a CATV system is far more actively engaged in the process of providing performances to its audiences. Its machinery is more sophisticated and expensive than the jukebox. It must be constantly operated by the proprietor and his employees. They select the stations, distant and local, whose programs it will carry. They can determine which of a given station's programs it will or will not carry. (255 F. Supp. at p. 188, quoted supra, p. 10) A CATV system is thus much more actively involved in furnishing copyrighted works to its audiences than is the proprietor of a jukebox.

Indeed, it is at least as actively involved as the local television station which merely retransmits broadcasts originated by the network with which it is affiliated. The District Court's opinion demonstrates this conclusively.* In terms

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* "Four typical distribution systems are used to extend television service;

1. Regularly licensed television broadcasting stations receive the signals of other television stations by direct off-the-air reception or by a coaxial cable or microwave link system from a network originating source and then distribute the signals by rebroadcasting them;

2. UHF translators . . .

3. VHF repeater stations . . .

4. CATV systems . . .

The electronic processes and equipment employed by all of these distribution systems for the reception, reproduction and transmission of the electromagnetic waves representing television programs originated by other television stations or network studios are basically the same in purpose, function and design." 255F. Supp. at 195.

"Defendant's systems, with respect to each channel received, perform a function substantially identical to that of a network affiliated station, UHF translator, or VHF repeater in that they all not only receive but also retransmit signals originated elsewhere." 255 F. Supp. at 196.

of capital investment, cost of operation and size of audience, most CATV systems—and especially the large systems developing in metropolitan centers—are also far more actively engaged in communicating copyrighted performances to their customers than is a local motion picture theatre which merely retransmits to a couple of thousand people each week the performance embodied in a motion picture film.

Finally, Section 1(e) refutes the majority opinion's conclusion that if CATV were held to be engaged in public performance, the manufacturers of television sets could also be deemed to "publicly perform." Obviously, Congress did not believe that because the operation of coin-operated or other commercially used phonographs was a public performance, manufacturers of the machines would be infringers. They are not, and no one has ever claimed they are. Obviously the manufacturer of a television set (or CATV equipment) would not be guilty of infringement because a purchaser used it for unauthorized public performances just as the manufacturer of a motion picture camera, or projector, or printing press is not liable for infringement if a purchaser used it to produce piratical copies or performances of a copyrighted work.

POINT II

CATV's communication of copyrighted works violates the other rights granted in Section 1(d).

In addition to the right of "public performance," Congress in 1909 also granted the author of a dramatic work the rights to "exhibit . . . , represent, produce or reproduce it in any manner or by any method whatsoever". However, the majority opinion did not consider whether the activities

of CATV violated any right other than that of "public performance." It must be presumed that in using these other terms Congress intended to grant more than the right of "public performance." In *Ex Parte Public Bank,* 278 U. S. 101, this Court declared:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignficant.'' ' *Market Co.* v. *Hoffman,* 101 U.S. 112, 115."

And in *Skovgaard* v. *The M/V Tungus,* 252 F. 2nd 14; aff'd 358 U.S. 588, the court said:

> "It it presumed that the legislature did not employ useless verbiage and that each word has independent meaning." (at p. 17)

We respectfully submit that Congress in 1909 intended to grant the author of a dramatic work the right to furnish performances of it to the public "by any manner or by any method whatsoever." The use of copyrighted works by CATV systems come well within the broad area of rights granted to authors of these works in Section 1.

POINT III

The creation of a CATV exemption is inconsistent with the purpose and constitutional mandate of the Copyright Act and will damage authors, the public and non-commercial television.

We respectfully submit that the Court's restricted interpretation of the rights granted authors in Section 1(d) is completely inconsistent with the purpose of the Copyright Act and the Constitutional mandate. As the Court pointed out in *Mazer* v. *Stein*, 347 U. S. 201, 219 (1954), the economic philosophy underlying the power to grant authors "the *exclusive* Right to their respective writings" (emphasis supplied) is to encourage individual effort by personal gain, as the best way of advancing the public welfare. Until now courts, including this Court, have never denied the author the right to control the use of his work in a new industry or medium of communication. Until now the courts have recognized that the author is entitled to compensation for the commercial use of his work whether "money is taken in at the door" or the user exploits his work by other means. *Herbert* v. *Shanley Co.*, 242 U. S. 591, 594.

The Constitutional mandate speaks of granting authors the "exclusive" right in their work. This does not suggest that rights granted by Congress should be narrowly interpreted by the Courts. This is particularly important in the case of dramatic works, for here Congress was not merely indulging in an act of grace; it was not giving authors something they could not have had but for the Constitution. On the contrary, when an author of a dramatic work secures a statutory copyright he exchanges absolute and

perpetual personal property rights for the 56 years of protection of the Copyright Act. Unlike books, plays remain protectable under common law—so long as they are not published—even though they are widely disseminated to the public. Public performance does not dedicate them: *Ferris* v. *Frohman*, 223 U. S. 424, 435. Thus, the Register of Copyrights said:

> "Under our present copyright law, 'publication' means making copies of a work available to the public. The important point here is that public performances, such as broadcasts and stage presentations, do not constitute 'publication.'
>
> • • • • •
>
> "Consequently, as long as a work is neither published in copies nor voluntarily registered, the exclusive rights under the common law continue with no time limit, even though the work is used commercially and widely disseminated." (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress 1st Session, pp. 39-40.)

In these circumstances, we submit that the rights granted in Section 1(d) cannot be construed on the assumption that Congress intended that a great industry which earns millions of dollars by furnishing performances of copyrighted works should be exempted from the obligation to obtain the authors' permission and compensate them for this use of their property.

The Decision Creates a "Jukebox Exemption" for CATV

As we have noted, the "jukebox exemption" was granted by Congress in 1909 to the operators of one type of coin-

operated phonograph in the belief that it was a "novelty of little economic consequence." The belief soon proved to be absolutely wrong. The jukebox industry now receives over a half-billion dollars a year for furnishing performances of musical compositions (Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law (July 1961), 87th Congress, 1st Session, p. 32). Everyone, except the proprietors of jukeboxes, agree that it is an unfair exemption. It is not found in the copyright law of any other country. Elsewhere composers are paid for this use of their works.

Here the Court has, in effect, written into the Copyright Act a "jukebox exemption" for the CATV industry. It is of cold comfort to authors to suggest, as the majority opinion does, that Congress can remove it. Efforts to eliminate the jukebox exemption from the Copyright Act have been unsuccessful for 40 years.

In the case of the jukebox exemption the industry was in its infancy. Here there is no doubt that the CATV industry is already a major medium for communicating performances of copyrighted works. An article in CATV, the trade journal of the industry, recently stated:

> "In contrast to the neophyte community antenna television industry of 1962, today cable television numbers more than 1400 strong, unified firms . . . serving 10 million American citizens. That these Americans rely on cable TV for a basic part of their entertainment and enlightenment is becoming increasingly apparent to our Federal lawmakers. Furthermore, the solid position of many large corporations in the CATV business can be ignored by neither the FCC majority nor Congress.

> "Unlike 1962 . . . the cable business of 1968 belongs substantially to companies like Westinghouse, GE, Gulf & Western, Time-Life, Foote, Cone & Belding, Hughes-TelePrompTer, CBS, NBC, Jefferson-Carolina, General Telephone, United Utilities, Kaiser, Cox Broadcasting, General Instruments, Meredith-Avco, Narragansett Capital, Jack Kent Cooke, Reeves Broadcasting and Storer Broadcasting . . . to name some of the companies which have substantially enlarged their position in CATV during the past few years. Other companies which have shown a definite interest in CATV include McDonnell-Douglas, General Mills, Litton Industries . . . plus a number of communications and entertainment-oriented giants." (CATV, Aug. 18, 1968, p. 4)

The exemption of CATV from the rights granted in Section 1 inevitably will damage not only authors but also the public. As the CATV industry and its audiences expand, producers of motion pictures, plays and other works will license CATV systems to originate transmissions. (Such arrangements for motion pictures are now being negotiated in New York and other areas.) As this CATV market becomes more profitable for producers of motion pictures and other works, it will become uneconomical for them to release their works for broadcast on television, under the Court's decision. For CATV systems which do not originate programs could pick up those broadcasts and retransmit them. The producers of motion pictures and other works could only protect the value and income of their works in the CATV medium by withholding them from television so they would only be accessible to CATV on a licensing basis.

Moreover, the decision will adversely affect nonprofit television stations and their audiences. These broadcasters pay

little or nothing for the right to broadcast performances of plays and other works. Under the decision, CATV systems could receive these broadcasts and retransmit them without paying the authors. While the author of a play may be willing to license a performance by a nonprofit station to its local audience for a nominal consideration, he cannot afford to have it performed on that basis if it could be carried by CATV systems to nation-wide audiences. Such a broadcast would seriously impair the value of his rights to have the play performed throughout the country by professional and amateur theatres and could also destroy the value of his motion picture and commercial television rights. The only way the author could protect these rights would be by withholding the right to produce the play from nonprofit stations —and even in some instances from commercial television stations. The authors of non-dramatic literary works are even more unfairly affected by the decision. A nonprofit station may now perform a non-dramatic literary work without permission because it is nonprofit (receiving no compensation). However, under the decision CATV systems are free to retransmit the performances of such works to paying audiences throughout the country, without compensating the author.

CONCLUSION

It is respectfully submitted that the petition for a rehearing should be granted.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

The undersigned counsel for the applicant, The Authors League of America, hereby certifies, pursuant to Rule 58 of the Rules of this Court, that the foregoing brief *amicus curiae* in support of the petition for rehearing is presented in good faith and not for delay.

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae

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FILED
FEB 17 1968
JOHN F. DAVIS, CLERK

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No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

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UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF AMICUS CURIAE TO PARTICIPATE IN ORAL ARGUMENT

The National Association of Broadcasters ("NAB") has this day filed a motion for leave to file an annexed brief *amicus curiae* in this case. The television broadcast industry has, as that brief shows, a heavy interest in the outcome of this case.

NAB has the same position as respondent on the issues of infringement and license implied in law, and does not request oral argument on these issues.

NAB urges, however, that this case should not be decided upon the premise, assumed by ~~both parties~~ petitioner and the Solicitor General, that a decision of infringement will bring automatic imposition of full copyright liability upon every

CATV system. The issues which bear on the extent of damages and profits remain to be tried. The ordinary exercise of judicial discretion can be expected to protect against unreasonable or oppressive results when those issues are reached. There is, accordingly, no occasion to strain the law, as does the memorandum for the United States, in premature search of a "middle ground" to avoid a result which is in any case unlikely.

We consider that ten minutes of oral argument would permit us to give the essence of our position in this respect, and have hope that its presentation might be of some help to the Court. We accordingly move, under Rule 44(7), for leave to participate to the extent of ten minutes, additional to the time allowed the respective parties, in the oral argument of this case.

Respectfully submitted,

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February 17, 1968